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No. 86-1750

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SOUTHERN METHODIST UNIVERSITY,
Petitioner,

v.

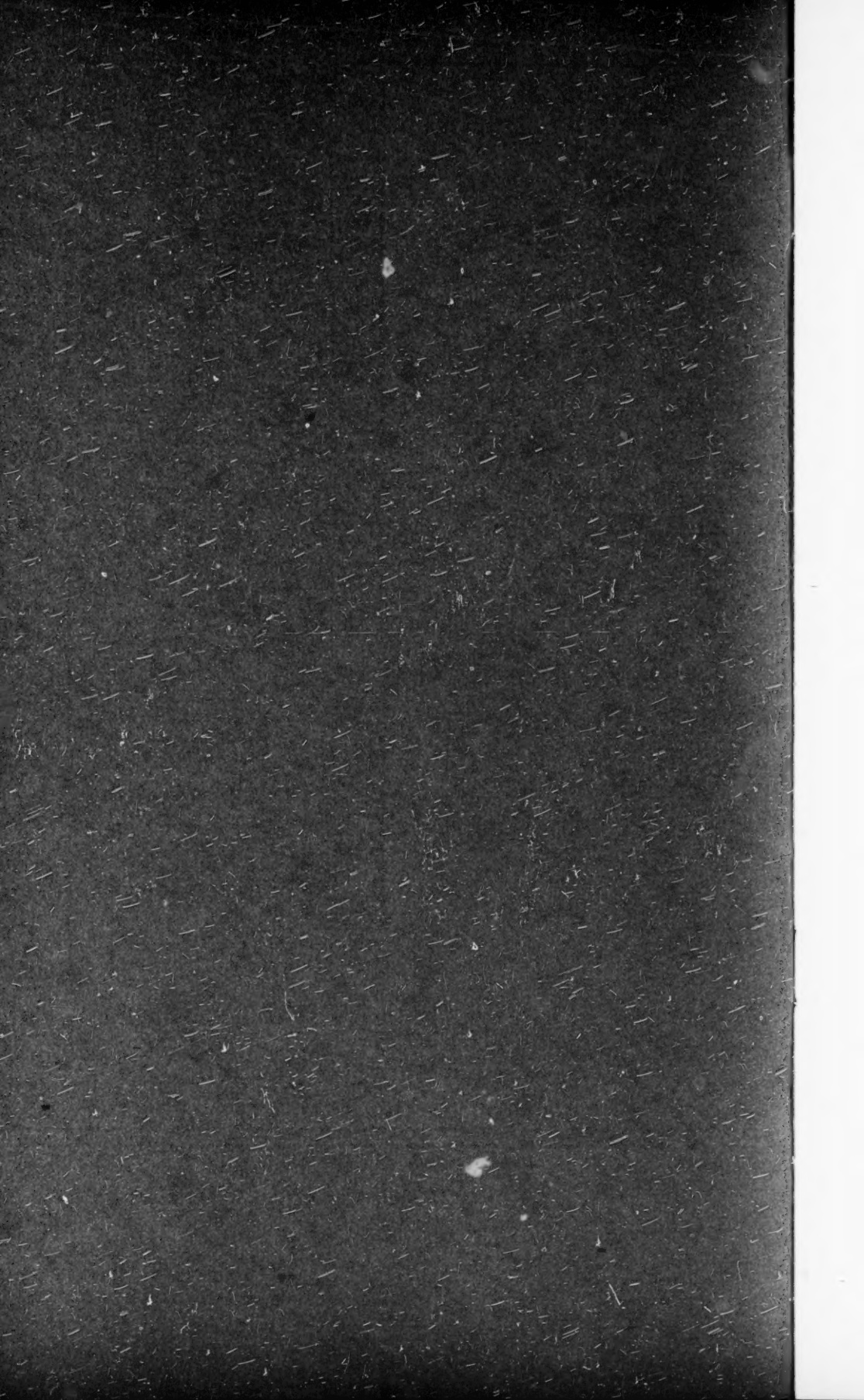
CAROLE KNEELAND, BELO BROADCASTING CORPORATION,
A.H. BELO CORPORATION d/b/a THE DALLAS MORNING NEWS,
DAVID EDEN, TIMES HERALD PRINTING COMPANY,
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
and SOUTHWEST ATHLETIC CONFERENCE,
Respondents.

**BRIEF OF RESPONDENT A.H. BELO CORPORATION
d/b/a THE DALLAS MORNING NEWS IN
OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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1780



QUESTION PRESENTED

Was the district court denial of intervention of right affirmed in error by the Fifth Circuit Court of Appeals?

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Respondent A.H. Belo Corporation d/b/a The Dallas Morning News, Plaintiff below, respectfully prays that a writ of certiorari be denied to Petitioner Southern Methodist University to review the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed in part and dismissed in part the appeal of Orders of the United States District Court for the Western District of Texas.

Southern Methodist University ("SMU") was denied intervention by the district court by written order of February 21, 1986 (a copy of which appeared as Appendix A-1 to SMU's Petition for Writ of Certiorari). SMU reurged its Motion for Leave to Intervene, which was denied by Order dated June 18, 1986. SMU pursued appeals from both denials which were consolidated in the Fifth Circuit.

On appeal, the Fifth Circuit upheld the district court with respect to intervention of right and dismissed for lack of jurisdiction with respect to permissive intervention. *Kneeland v. National Collegiate Athletic Association*, 806 F.2d 1285 (5th Cir. 1986) ("*Kneeland v. NCAA*").

JURISDICTION

The judgment of the Court of Appeals in Cause Nos. 86-1118 and 86-1477, which were consolidated on appeal, was entered on January 7, 1987. *Kneeland v. NCAA*, 806 F.2d 1285. An order denying a rehearing was entered on February 3, 1987. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

RULE INVOLVED

Federal Rule of Civil Procedure 24(a) (2)

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

* * *

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.*

Fed. R. Civ. P. 24 (emphasis added).

STATEMENT OF THE CASE

Belo Broadcasting Corporation and Carole Kneeland (collectively "Belo Broadcasting") as Plaintiffs, filed suit on October 3, 1985 in the 261st judicial district court for Travis County, Texas against the National Collegiate Athletic Association ("NCAA") and the Southwest Athletic Conference ("SWC") seeking under the Texas Open Records Act, art 6252-17a, Tex. Rev. Civ. Stat. ("TORA" or the "Act") the federal and state constitutions, and 42 U.S.C. § 1983, documents relating to NCAA and SWC investigations of the intercollegiate athletic programs of member schools of the SWC. A.H. Belo Corporation d/b/a/ The Dallas Morning News ("The News") timely intervened as Plaintiff in Texas state court without opposition by any party. (The state court interventions of The News was not at issue in the federal district court or before the Fifth Circuit, nor has any issue relating to such intervention been raised to this Court.) Subsequently, Defendants NCAA and SWC removed the case to federal court. None of the Plaintiffs below sought documents from or relief against SMU.¹

SMU, a member of the NCAA and SWC, filed a motion for leave to intervene in the district court on November 26, 1985. Although SMU knew about the suit from its outset in Austin state court, SMU waited until one month after the case had been removed to federal court to file its intervention and never requested a hearing on it.

At a February 7, 1986 pre-trial conference, the district court bifurcated the trial of the case, setting the first trial for March 6, 1986. The district court also heard argument on

¹ In a separate state court action, The News pursued Open Records Act litigation directly against SMU, Cause No. 85-13967-E, in the 101st state District Court of Dallas County, Texas, which was successfully defended by the school. It was in the state court suit, not in the instant case, that the issue of the applicability of TORA to SMU was adjudicated; in its Petition, SMU incorrectly suggested that this issue was before the federal district court.

SMU's intervention motion at the pre-trial conference but SMU produced no witnesses and did not offer to present any testimony or exhibits. Intervention was denied by the court's February 21, 1986 order.

In denying intervention, the district court noted that intervention was not meritorious and that the ultimate interests of SMU — prevention of disclosure of documents in the possession of the NCAA and SWC — were adequately represented by counsel for the NCAA and SWC. See Appendix A-1 to Petition for Writ of Certiorari. SMU appealed to the Fifth Circuit, which by Order of February 28, 1985 summarily denied SMU's Motion for Stay Pending Appeal.

After the February 7 hearing and in preparation for the March 6 trial, The News, Belo Broadcasting and the Times Herald concluded discovery, including deposing the NCAA's executive director, assistant executive director, and controller as well as the SWC's assistant commissioner, business manager, and chairman of compliance committee. Of course, the Plaintiffs also undertook substantial trial preparation in anticipation of the March 6 trial setting.

Following the first phase of the trial, the district court ruled by order of May 15, 1986, that the SWC and the NCAA are "governmental bodies" subject to the Texas Open Records Act ("TORA"). *Kneeland v. National Collegiate Athletic Association*, 650 F.Supp. 1047 (W.D. Tex. 1986). The district court ordered the SWC and the NCAA to produce their documents requested by the Plaintiffs for an in-camera inspection to determine the applicability of any TORA exemptions. The trial court's ruling was followed by a flurry of action by the Defendants, seeking to vacate or stay the court's ruling, and pleading and briefing a multitude of defenses to Plaintiffs' remaining claims. After the May 15

ruling, SMU re-urged its Motion for Leave to Intervene, which was denied by written order dated June 18, 1986, on the grounds that allowing intervention at such late stage of the litigation would unduly prejudice the rights of the Plaintiffs, and again holding that the NCAA and the SWC adequately represented SMU's interests. SMU filed an appeal of this denial to the Fifth Circuit, No. 86-1477.

The second phase of the trial was held July 24-25, 1986. The Court heard the NCAA and SWC's arguments and evidence regarding the defenses of right to privacy, academic freedom, freedom of association, and unconstitutionality of the Act, and others from among the 36 defenses and 6 affirmative defenses asserted in Defendants' amended answers and briefs. The district court issued an opinion on August 18, 1986, holding that the NCAA and the SWC had proven no affirmative defenses to disclosure. *Kneeland v. National Collegiate Athletic Association*, 650 F.Supp 1064 (W.D. Tex. 1986).

On November 4, 1986, the district court issued its final opinion, disposing of issues relating to various TORA exemptions to disclosure. *Kneeland v. National Collegiate Athletic Association*, 650 F.Supp. 1076 (W.D. Tex. 1986). It held that the public's legitimate interest in the information outweighed any privacy interests, and that prior to disclosure of the records, information should be deleted that would reveal the identities of the particular students involved. The trial court's rulings came after thorough and vigorous representation by counsel for the Defendants, who pleaded, briefed and argued every conceivable defense and exception to disclosure.

Both of SMU's appeals were consolidated on appeal to the Fifth Circuit. The Fifth Circuit affirmed the district court

decisions denying intervention, finding that the trial judge correctly concluded that SMU was adequately represented by the NCAA and SWC. The Fifth Circuit dismissed SMU's claim that it was improperly denied permissive intervention, finding that the district court had not abused its discretion in such denial. SMU has requested that this Court grant a writ of certiorari to review the Fifth Circuit's decision.

REASONS FOR DENYING THE WRIT

I. SMU Was Correctly Denied Intervention

In concluding that Petitioner SMU could not intervene as of right, the Fifth Circuit correctly applied the law on intervention as set forth by this Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972), and as applied in the Fifth Circuit in several subsequent decisions. See *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984); *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc), cert. den'd 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360; *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978). The Fifth Circuit's test recognizes that an applicant's burden of showing inadequacy of representation is minimal, but the intervenor bears the burden of rebutting a presumption of adequacy when the intervenor has the same ultimate objective as a party to the suit. *Bush v. Viterna*, 740 F.2d at 355. However, the Fifth Circuit recognizes, as SMU does not, that although an applicant's burden may be minimal, "it cannot be treated as so minimal as to write the requirement completely out of the rule." *Id.* Thus, correctly applying the standard set by Rule 24(a)(2), the Fifth Circuit concluded on the facts that SMU was not entitled to intervention of right because it failed in the minimal burden of rebutting the presumption of adequacy.

SMU argued in district court that because the documents sought from the NCAA concerned the school, they had a stronger interest in defending the suit than the NCAA. Yet, the court found on the facts that even though at most SMU may have a slightly greater interest in the litigation, it failed to show any adversity of interest. *Kneeland v. NCAA*, 806 F.2d at 1288. Because it was applicant's minimal burden to demonstrate adversity of interest, not merely greater interest, SMU was properly denied intervention of right.

SMU's arguments in the Petition that the regulator/regulated relationship could create adversity were addressed and rejected by the Fifth Circuit, distinguishing this Court's decision in *Trbovich* on the facts. *Id.* Additionally, its arguments concerning SMU's claim of a property right in the documents sought, while relevant to the second requirement for intervention of right, is irrelevant to the adequacy of representation issue.

SMU's argument in the Petition that it had defenses available to it that were unavailable to the NCAA or the SWC is not correct and was addressed and rejected by the Fifth Circuit, since under Texas law the NCAA and the SWC have standing to raise any defenses to disclosure that their members could raise. *Kneeland v. NCAA*, 806 F.2d at 1288 (citing *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 678 (Tex. 1976)). In fact, the NCAA and SWC did raise 36 defenses and 6 affirmative defenses in their amended answers and briefs. The arguments made in the Petition with respect to SMU's right to privacy, freedom of association, and due process were all made in phase two of the trial and were rejected by the district court. As pointed out by the Fifth Circuit but ignored by SMU, the district court's ultimate holding denying affirmative defenses of the NCAA and the SWC was

irrelevant to the decision on intervention. The intervention decision was made prior to that trial. Thus, SMU argues from hindsight, a luxury necessarily unavailable to the district court. Understandably, SMU regrets that the NCAA and the SWC lost the case, but that fact standing alone affords no basis for reversal of the trial court nor does it show inadequacy of representation. As the Fifth Circuit noted, the remedy for any error on the merits by the trial court is appeal by the NCAA and the SWC. *Kneeland v. NCAA*, 806 F.2d at 1289.

II. There is No Conflict Among the Circuits.

SMU argues that there is a conflict among the Circuits with respect to who had the burden of proof and what that burden is. To make this point, SMU cites two cases in the D.C. Circuit which predate this Court's decision in *Trbovich v. United Mine Workers*, 404 U.S. 528. This Court, in *Trbovich*, made it clear that the burden of proof is on the applicant, though that showing "should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10. Since *Trbovich*, all Circuits have uniformly applied its standard, including the D.C. Circuit which explicitly follows the holding in *Trbovich*. *Natural Resources Defense Council v. Castle*, 561 F.2d 904, 911 (D.C. Cir. 1977) (quoting *Trbovich*) and *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 130 (D.C. Cir. 1972) ("We are guided by the Court's admonition in *Trbovich*."). See also 3B Moore's Federal Practice ¶ 24.07[4] at 24-71 (citing cases in all Circuits but the Eleventh and Federal following the *Trbovich* rule).

SMU argues that other circuits have allowed intervention in particular cases where the party seeking intervention sought the same ultimate result as existing parties. SMU Petition at 20-22. Yet, each of these cases is distinguishable

on the facts. SMU cites no cases finding an absence of conflict or adversity of interest as with the present case. *Corby Recreation, Inc. v. General Electric Co.*, 581 F.2d 175 (8th Cir. 1978) (applicant's interest in conflict with all existing parties); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (not clear that an existing party will make all of applicant's arguments due to potential conflict in interests); *Smith v. Pangilinan*, 651 F.2d 1320 (9th Cir. 1981) (local interests of Northern Marianas officials in conflict with applicant U.S. Attorney General); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (applicant did not seek same ultimate result as existing parties); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978) (applicant had defense not available to existing defendant); *New York Public Interest Research Group, Inc. v. Regents of University of State of New York*, 516 F.2d 350 (2d Cir. 1975) (applicants' economic arguments not vigorously represented by party seeking to apply standards of professional conduct).

There being no conflict in the Circuits as to the applicable standard in Rule 24(a)(2) cases and all cases cited by Petitioner being distinguishable on the facts, certiorari should be denied.

III. The Issues Are Not Sufficiently Important to Warrant This Court's Attention.

The sole issue in this case is whether the district court, in applying the correct standard for Rule 24(a)(2) intervention of right, erred in concluding that the particular facts of the case did not warrant intervention. The issue turning on the particular facts of this case alone are of interest only to the parties to it. SMU is asking this Court to make a third review of its arguments and the record in this case to determine whether this unique set of facts warrants intervention of right.

This case does not in any way broadly concern the standard to be used in Rule 24(a)(2) intervention of right cases. It simply involves whether the facts SMU presented demonstrated that their interests were not adequately represented by the NCAA and SWC, the question being already resolved twice in favor of Respondents, and without any impact outside the limits of the case. Certiorari, therefore, should be denied.

IV. A Reversal of the Decision Below Will Only Lead to More Appellate Review.

A reversal of the Fifth Circuit opinion by this Court would do little to bring this issue to ultimate conclusion. The case would need to be remanded for the Fifth Circuit to decide 1) whether SMU's application for intervention was timely, 2) if SMU had a sufficient interest in the documents being requested, which are not the property of SMU, and 3) whether SMU's ability to protect its interests would be sufficiently impeded by an adverse decision in the case-to-chief. The parties strongly disagree on these three issues.

In light of this Court's inability to ultimately resolve this dispute between the parties, the Court should use its discretion to deny certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

DATED: July 1, 1987
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CERTIFICATE OF SERVICE

This will certify that three true and correct copies of the foregoing Respondent's Brief on Petition for Writ of a Certiorari have been sent, by certified mail, return receipt requested, to counsel of record for petitioner and respondents as follows:

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